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# The Louisiana Teachers' Tenure Act - Protection from Dismissal for Striking Teachers?

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# THE LOUISIANA TEACHERS' TENURE ACT—PROTECTION FROM DISMISSAL FOR STRIKING TEACHERS?

The power to employ and dismiss teachers rests with the parish school board and cannot be delegated.[1] The Louisiana Teachers' Tenure Act protects permanent[2] teachers from removal as a result of "political vengeance and reprisals"[3] by limiting the grounds for dismissal to incompetency, dishonesty, willful neglect of duty, and membership in any group prohibited from operating in Louisiana.[4] A permanent teacher is entitled to a copy of the specific charges and the reasons for them at least twenty days in advance of a school board hearing, and may request that the hearing be either public or private. She may also have counsel and witnesses present during the hearing.[5]

Before a permanent teacher may be dismissed or disciplined, a school board must find her guilty of one of the specified charges. The teacher can then apply for a full court hearing within one year of the school board's finding. The reviewing court is given the power to affirm or reverse the action of the school board[6] and to order the teacher reinstated with full benefits restored, including full pay for loss of time or salary.[7]

This comment examines the extent to which the Tenure Act protects striking teachers from dismissal. A school board may bring a charge of "willful neglect of duty," one of the specified grounds for dismissal under the act,[8] against teachers who refuse to work. A public policy favoring

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1. La. Const. art. VIII, § 3(A) provides that the State Board of Elementary and Secondary Education has no control over the selection or removal of school board officers and employees. See Johnson v. Board of Elementary and Secondary Educ., 414 So. 2d 352 (La. 1982).

2. A permanent (tenured) teacher is one who has served three years or more as a teacher. A temporary (probationary) teacher is one who has served less than three years. A probationary teacher may be discharged upon written recommendation of the superintendent accompanied by valid reasons. Unless the school board notifies a probationary teacher of his dismissal, he is automatically deemed tenured at the expiration of three years. La. R.S. 17:442 (1982).

3. Kennington v. Red River Parish School Bd., 200 So. 514, 516 (La. App. 2d Cir. 1940); Reed v. Orleans Parish School Bd., 21 So. 2d 895 (La. App. Orl. 1945).

4. La. R.S. 17:443(A) (1982).

5. Id.

6. Arbitrary and capricious actions by the board are grounds for reversal.

7. La. R.S. 17:443(B) (1982).

8. The causes of removal of a teacher—willful neglect of duty, incompetency, dishonesty, and membership in a prohibited group—are exclusive. Gassen v. St. Charles Parish School Bd., 199 La. 954, 963, 7 So. 2d 217, 220 (1942); State ex rel. Penny v. Rapides Parish School Bd., 1 So. 2d 334, 335 (La. App. 2d Cir. 1941); *Kennington*, 200 So. at 516-17.

the right of public employees to engage in a work stoppage in the context of a labor dispute may affect a reviewing court's conclusion concerning a school board decision to dismiss a striking teacher. Although the right of public employees to strike has not been expressly addressed by statute in Louisiana, recent jurisprudence indicates that not all strikes by such employees are illegal. This comment examines the legal relationship between "willful neglect of duty" and the jurisprudential recognition of teachers' right to strike.

## THE MEANING OF WILLFUL NEGLECT OF DUTY

Courts regularly state that the provision in the Teachers' Tenure Act providing for a "full hearing to review the action of the school board" is to be interpreted in favor of discharged teachers.[9] However, the scope of review is limited. The questions for the court on review are 1) whether the act of the school board was arbitrary or capricious, and 2) whether the board's decision was based on substantial evidence. In cases where teachers have refused to report for work in a non-labor dispute context, reviewing courts have upheld school board orders of dismissal for willful neglect of duty as a rational exercise of the board's exclusive power to dismiss employees of the school system.[10] The dismissal of a teacher is largely within the sound discretion of the school board under the Teachers' Tenure Act, and unless he can clearly show that the board has abused its discretion, the courts will not interfere.[11] The following cases illustrate factual situations in which teachers were dismissed for willful neglect of duty.

In order to find a teacher guilty of willful neglect of duty, the evidence before the board must establish that the teacher violated a school policy of which she was aware. In *Cunningham v. Franklin Parish School Board*,[12] the board dismissed a tenured teacher for willful neglect of duty. On one occasion, the teacher had left her classroom unattended, locking three pre-school handicapped children in the room. On another, she had missed her classes without permission and without obtaining a substitute. The Second Circuit Court of Appeal affirmed

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9. The provisions of the act must be liberally construed in favor of the class for whose benefit the act was passed. Lea v. Orleans Parish School Bd., 228 La. 987, 84 So. 2d 610 (1955).

10. See, e.g., Hamberlin v. Tangipahoa Parish School Bd., 210 La. 483, 27 So. 2d 307 (1946); Wiley v. Richland Parish School Bd., 476 So. 2d 439 (La. App. 2d Cir. 1985); Mims v. West Baton Rouge Parish School Bd., 315 So. 2d 349 (La. App. 1st Cir. 1975).

11. State ex rel. Piper v. East Baton Rouge Parish School Bd., 213 La. 885, 35 So. 2d 804 (1948). See Note, Teachers' Tenure Law—Necessity for a Hearing on an Involuntary Transfer, 15 Loy. L. Rev. 200 (1968-69).

12. 457 So. 2d 184 (La. App. 2d Cir. 1984).

the dismissal, holding that a rational basis existed for the board's action and that the teacher had sufficient notice of the board's policy. The court had no difficulty in equating the teacher's actions with neglect of duty: "A school system could not operate efficiently if its teachers were permitted to miss their classes without permission and without making arrangements for a substitute in order to take care of personal business, however worthy it might be."[13]

The teacher contended that her actions could not be deemed "willful" as required under the Act in the absence of a prior warning of the provisions of the Act. The court disagreed, however, recognizing that a warning is not required in situations where a teacher, merely by the nature of her position, should be aware of the impropriety of the practice. The requirement that teachers be present to conduct their classes is such a basic and essential ingredient of a smooth-functioning school system that the board need not provide a warning of the consequences of the violation of such a policy.

Applying the *Cunningham* court's rationale to the context of a labor dispute, a striking teacher who blatantly refuses to conduct her classes obviously has not obtained permission from the board, nor has she obtained a substitute. Indeed, the presence of either of these two factors would effectively negate any impact that the strike might have on negotiations between teachers and the board. In a labor dispute context, willful violation of board policy is intended to disrupt the efficiency of the school system, thereby creating an incentive for the board to address the teachers' grievances. The Tenure Act, however, makes no distinction between neglect of duty for private reasons and neglect of duty intended as a concerted effort to achieve better working conditions and salary improvement. Thus, past interpretation of the Tenure Act affords a tenured teacher no protection from dismissal while participating in a work stoppage. Only a statutory or jurisprudential right of absence from work would override the board's duty to keep the schools operating.

In *Slaughter v. East Baton Rouge Parish School Board*,[14] the school board dismissed a teacher for willful neglect of duty when she failed to report to a different school. After teaching for nine years at the same school, the school board approved her principal's recommendation for transfer to another school due to a personality conflict. Later attempts by the board to reach a compromise more agreeable to the teacher were fruitless.

When the teacher failed to report to her new school on the date ordered, the superintendent warned her by letter that dismissal pro-

13. Id. at 188. See Simon v. Jefferson Davis Parish School Bd., 289 So. 2d 511 (La. App. 3d Cir. 1974).

14. 432 So. 2d 905 (La. App. 1st Cir. 1983).

ceedings would commence if she failed to report for work within one week. The teacher chose to ignore the warning, and, following a tenure hearing, the board voted to dismiss her. After initially determining that the board had authority to order the teacher's transfer,[15] the court in *Slaughter* reasoned that a school board may validly order an employee to report for duty. The teacher's failure to report to work after the order was given thus became a willful neglect of the teacher's duty to obey board directives rather than a simple absence from work. A teacher must abide by reasonable orders from the board or be subject to a charge of willful neglect of duty.

One typical school board response to the disruption caused by a strike is to order the teachers to return to work.[16] If refusing to obey a board order to return to work constitutes a per se willful neglect of duty, as *Slaughter* suggests, then teachers can be found guilty and dismissed at a later tenure hearing on this basis alone. The issue of whether the teachers' grievances justified the abandonment of their duties might not be addressed.

Other alternatives might be employed by a school board when faced with a teacher's absence without official leave. Depending on the circumstances, the board could characterize the absence either as a voluntary abandonment of the teacher's position or as a voluntary resignation from her employment. The board's choice in labeling the teacher's action affects the teacher's right to a hearing under the Tenure Act.

Where a tenured teacher fails to report for work and cannot be contacted, a school board might infer that the teacher has voluntarily abandoned her position. If, in addition, the teacher changes residence and leaves no forwarding address, it would be logical to assume she no longer has an interest in her employment. Under these circumstances, the school board may either bring charges of willful neglect of duty or assume that the teacher intended to resign.

The Tenure Act's procedural protections are triggered only by school board actions to dismiss or demote a tenured teacher. If a school board chooses to dismiss a teacher who has voluntarily abandoned her position, the statutory procedure must be followed regardless of whether the teacher actually receives notice of the hearing.[17] A teacher's response to

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15. In Rosenthal v. Orleans Parish School Bd., 214 So. 2d 203, 207 (La. App. 4th Cir. 1968), the court set forth four conditions under which a transfer may be a "removal": 1) where a reduction in salary is involved; 2) where the new position requires the teaching of subjects for which the teacher is not qualified; 3) where the teacher must undergo additional training; and 4) where the transfer follows a dismissal without formal charges, or a hearing, and thus leaves a blot on the teacher's record.

16. See D. Colton and E. Graber, Teacher Strikes and the Courts (1982).

17. For example, in 1971, the East Baton Rouge Parish School Board attempted to notify a teacher of her right to appear at a hearing on charges of incompetency. Although

the notice will dispel the assumption that she no longer has any interest in her employment and that she has, therefore, voluntarily abandoned her employment. Where the teacher does not respond, the hearing may still proceed in her absence. In either case, the teacher was offered the opportunity to be heard, and the school board is protected if the teacher later returns and seeks reinstatement.

A school board's interpretation of an abandonment as an implied resignation, however, affords the teacher no protection under the Tenure Act. A resignation is not an action initiated by the board for dismissal or demotion. Resignation procedures are not delineated by state statute. Therefore, individual school boards set their own policies on the manner of tendering resignations.

Typically, a school board should require that a resignation be in writing and formally accepted by the board in order to become effective.[18] This policy protects the board when a teacher later attempts to withdraw her resignation. In cases of emergency, such as sudden illness, a board might accept an oral resignation on condition that it be confirmed later in writing.[19] A board acting on an oral statement of intent alone accepts the risk that the teacher may later seek reinstatement. Should the board fail to prove the teacher resigned, then its action could only be interpreted as a dismissal without due process and in violation of the Tenure Act requirements.

A teacher who evidences a lack of interest in employment by failing to report to work and moving out of the school district has communicated no express intent, oral or written, to resign from his employment. A board accepting such a resignation by implication exposes itself to the same risks as when the teacher's resignation is oral. The teacher could return, seek reinstatement, and argue that the board's action constituted a dismissal in violation of the Tenure Act, entitling her to reinstatement.

In certain circumstances, however, a reviewing court might find a board's acceptance of a teacher's tacit resignation valid. A total lack of interest in her position together with actions inconsistent with her intent to remain employed, such as obtaining a different employer, may be viewed as providing the school board with a rational basis for inferring resignation.

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the Post Office notified the teacher three times that she had a registered letter in her mailbox, she did not actually receive and sign for the letter until one day after her dismissal. State Times, February 12, 1971, at 1, col. 2.

18. Written resignations are strongly encouraged because of later difficulties which arise when an employee wishes to withdraw the resignation.

19. Id. The safer approach followed by board attorneys is to commence a formal dismissal hearing in compliance with the Tenure Act.

A striking teacher voluntarily abandons her post in response to her dissatisfaction with the conditions of her employment. Despite this action, the economic and emotional costs associated with concerted work stoppages are too high to the striking teacher for a school board rationally to believe that she no longer wishes to work. In this situation, a school board declaration proclaiming the resignation of all absent teachers is tantamount to a dismissal. The procedural safeguards embodied in the Tenure Act should be utilized to protect striking teachers, most of whom fervently hope that their actions will enable them to return to their duties soon. A subjective intent to resign cannot reasonably be inferred from a teacher's participation in a strike action.

## THE LEGALITY OF TEACHERS' STRIKES

American law views public sector strikes in a manner substantially different from strikes in the private sector.[20] Although Congress has regulated private sector and federal employee labor relations, its legislation has not extended to state, county, or municipal employees.[21] Consequently, public employee strikes have been regulated by the states through grants of the right to strike to nonessential employees and through legislative silence.[22]

### *Prohibition of Public Employee Strikes*

At common law, the Sovereignty Doctrine recognized the right of the sovereign to prohibit strikes by public employees.[23] Today, strikes by public employees are illegal either by statute or at common law in most states.[24] A strike by employees of the United States government is a crime.[25]

The denial of the right to strike to public employees is principally based on the view that such strikes are incompatible with the proper functioning of government. Public employees serve the public welfare;

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20. See Hanslowe and Acierno, The Law and Theory of Strikes by Government Employees, 67 Cornell L. Rev. 1055 (1982).

21. The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-69 (1982), as amended by the Labor Managment Relations Act (LMRA), 29 U.S.C. §§ 141-87 (1982), governs private sector employees. Federal employees are regulated by 5 U.S.C. §§ 7301-52 (1976).

22. See Comment, Damage Liability of Public Employee Unions for Illegal Strikes, 23 B.C.L. Rev. 1087 (1982).

23. See, e.g., City of Manchester v. Manchester Teachers Guild, 100 N.H. 507, 131 A.2d 59 (1957); City of Cleveland v. Division 268 of Amalgamated Ass'n of St. Employees of America, 41 Ohio Op. 236, 90 N.E.2d 711 (C.P. 1949).

24. See infra note 34 for a listing of some exceptions.

25. 5 U.S.C. § 7311 (1982).

thus, a public employee strike is a contravention of the public welfare and the equivalent of a denial of governmental authority.[26]

The view that public employee strikes distort the democratic process forms another basis for the prohibition. If, in addition to the usual methods of political pressure, unions are able to strike, then collective bargaining would improperly skew the results of the American political process.[27]

In the absence of a statute expressly prohibiting strikes by public sector employees, most courts have denied public employees the right to strike under the common law rule.[28] In *Norwalk Teachers' Association v. Board of Education*,[29] the plaintiff teachers' union sought a declaratory judgment as to whether its members could engage in a concerted work stoppage. The court answered the question in the negative. Even in the absence of a prohibitory statute, the court held that public employees, as agents of the government and exercising some part of the sovereignty entrusted to it, have no right to strike.

At the time *Norwalk* was decided, commentators were unanimous in their opinion that public employee strikes were unthinkable and intolerable.[30] Three presidents had made strong public statements condemning strikes by public employees.[31] For example, in commenting on a Boston police strike, Calvin Coolidge stated: "There is no right to strike against public safety by anybody anywhere at any time."[32] The *Norwalk* decision may thus be viewed as the natural result of the overwhelming disapproval of public employee strikes by commentators, executives, and the judiciary.

*Statutory Right to Strike*

Ten states grant public employees the right to strike as part of a comprehensive collective bargaining scheme to regulate public employee

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26. Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951). See Hanslowe and Acierno, supra note 20, at 1061.

27. Wellington and Winter, The Limits of Collective Bargaining in Public Employment, 78 Yale L.J. 1107, 1123 (1969).

28. See Potts v. Hay, 229 Ark. 830, 318 S.W.2d 826 (1958); *City of Manchester*, 100 N.H. 507, 131 A.2d 59 (1957); *Norwalk Teachers' Ass'n*, 138 Conn. 269, 83 A.2d 482 (1951).

29. 138 Conn. 269, 83 A.2d 482 (1951).

30. See 1 L. Teller, Labor Disputes and Collective Bargaining § 171 (Supp. 1943); Note, Labor—Collective Bargaining Rights of Governmental Employees—Checkoff, 94 U. Pa. L. Rev. 427 (1946).

31. President Wilson characterized a Boston police strike as "an intolerable crime against civilization." See Vogel, What About the Rights of the Public Employee?, 1 Lab. L.J. 604, 612 (1950). President Franklin D. Roosevelt stated in 1937 that "'militant tactics have no place in the functions of any organization of government employees.'" Id. (quoting letter from President Franklin D. Roosevelt to the President of the National Federation of Federal Employees (Aug. 16, 1937)).

32. Id.

relations.[33] The grant is typically limited, however, in two ways. In some states, only certain categories of public employees may strike legally. Under most statutes, strikes which impose a significant risk to the public safety, health, or welfare can be enjoined.[34]

Statutory grants of the right to strike typically exclude "essential" public employees. The "essential" nature of a service is legislatively determined, resulting in a variety of exceptions, including bans on strikes by correctional and hospital personnel, guards at prisons and mental facilities, and court personnel.[35]

Most statutes prohibit fire fighters and police officers from striking. The exclusion of these categories of employees from the strike grant is justified because "the probability that a strike will result in immediate danger to public health and safety is so substantial that strikes are almost invariably inappropriate."[36] In contrast, no state statute includes teachers in the category of "essential" public employees. The Illinois statute expressly grants teachers the right to strike.[37] In states which broadly grant public employees the right to strike, except for "essential" categories of employees, teachers are allowed to participate in strike actions.[38]

*Constitutional Right to Strike*

Prohibitions against strikes by public employees have been challenged on almost every conceivable basis.[39] The question of whether a strike

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33. The ten states are Alaska, Hawaii, Idaho, Illinois, Minnesota, Ohio, Oregon, Pennsylvania, Vermont, and Wisconsin.

34. See Alaska Stat. §§ 23.40.070-23.40.260 (1986); Haw. Rev. Stat. §§ 89-1 to -20 (1976 & Supp. 1984); Illinois Public Labor Relations Act §§ 1-27, Ill. Ann. Stat. ch. 48, paras. 1601-27 (Smith-Hurd 1986) (public employees generally), Illinois Educational Labor Relations Act §§ 1-21, Ill. Ann. Stat. ch. 48, paras. 1701-21 (Smith-Hurd 1986) (educational employees); Minn. Stat. Ann. §§ 179A.01-.25 (West Supp. 1987); Mont. Code Ann. §§ 39-31-101 to 39-31-409 (1985); Or. Rev. Stat. §§ 243.650-.782 (1986), Pa. Stat. Ann. tit. 43, §§ 1101.101-.2301 (Purdon Supp. 1986); Vt. Stat. Ann. tit. 21, §§ 1721-35 (1978 & Supp. 1985) (municipal employees); Wis. Stat. Ann. §§ 111.70-.97 (West 1974 & Supp. 1986).

35. See, e.g., Alaska Stat. § 23.40.200 (1986) and Pa. Stat. Ann. tit. 43, § 1101.1001 (Purdon Supp. 1986).

36. Burton and Krider, The Role and Consequences of Strikes by Public Employees, 79 Yale L.J. 418, 437 (1970).

37. Illinois Educational Labor Relations Act §§ 1-21, Ill. Ann. Stat. ch. 48, paras. 1701-21 (Smith-Hurd 1986).

38. Id.

39. First amendment challenges: Board of Educ. v. Kankakee Fed'n of Teachers Local No. 886, 46 Ill. 2d 439, 264 N.E.2d 18 (1970), cert. denied, 403 U.S. 904, 91 S. Ct. 2203 (1971); Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965); Jefferson County Teachers' Ass'n v. Board of Educ., 463 S.W.2d 627 (Ky. 1970), cert.

ban could be justified provoked a vigorous debate in the late 1960s and early 1970s.[40] The Sovereignty Doctrine became untenable in the face of a recognized constitutional right to organize.[41] Since the right to strike seemed intimately related to the fundamental right to form labor unions, it was argued that a ban on the right to strike violated the first amendment.[42]

Despite scholarly attacks, no court prior to 1985 had upheld the right of public employees to strike in the absence of statutory authorization. The Supreme Court of California was the first to recognize that the right to strike rose to the level of a basic civil liberty. In *County Sanitation District No. 2 v. Los Angeles County Employees Association Local 660*,[43] the sanitation district sued the public employees' union seeking damages for an allegedly unlawful strike. The court held that the Meyers-Milias-Brown Act, which specifically prohibited strikes by fire fighters, did not prohibit work stoppages by county and municipal employees. The court thus decided that strikes to enhance bargaining demands may be conducted by such governmental employees, unless they "pose an imminent threat to public health or safety." Rejecting

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denied, 404 U.S. 865, 92 S. Ct. 75 (1971); School Dist. for City of Holland v. Holland Educ. Ass'n, 380 Mich. 314, 157 N.W.2d 206 (1968); Rogoff v. Anderson, 34 A.D. 2d 154, 310 N.Y.S.2d 174 (1970); State v. Heath, 177 N.W.2d 751 (N.D. 1970); Abbott v. Myers, 20 Ohio App. 2d 65, 251 N.E.2d 869 (1969); City of Pawtucket v. Pawtucket Teachers' Alliance Local 930, 87 R.I. 364, 141 A.2d 624 (1958); City of Wauwatosa v. King, 49 Wis. 2d 398, 182 N.W.2d 530 (1971); Regents v. Teaching Assistants' Ass'n, 74 L.R.R.M. (BNA) 2049 (Wis. Cir. Ct. 1970).

Thirteenth amendment challenges: City of Evanston v. Buick, 421 F.2d 595 (7th Cir. 1970); Pinellas County Classroom Teachers Ass'n v. Board of Pub. Instr., 214 So. 2d 34 (Fla. 1968); *School Dist. for Holland*, 380 Mich. 314, 157 N.W.2d 206; In re Block, 50 N.J. 494, 236 A.2d 589 (1967).

Fourteenth amendment challenges: *Jefferson County Teachers' Ass'n*, 463 S.W.2d 627; *School Dist. for City of Holland*, 380 Mich. 314, 157 N.W.2d 206; *In re Block*, 50 N.J. 494, 236 A.2d 589; City of New York v. De Lury, 23 N.Y.2d 175, 243 N.E.2d 128 (1968), appeal dismissed, 394 U.S. 455, 89 S. Ct. 1223 (1969); *Abbott*, 20 Ohio App. 2d 65, 251 N.E.2d 869.

Bill of Attainder challenges: Di Maggio v. Brown, 19 N.Y.2d 283, 225 N.E.2d 871 (1967); *Abbott*, 20 Ohio App. 2d 65, 251 N.E.2d 869.

40. Dripps, New Directions for the Regulation of Public Employee Strikes, 60 N.Y.U. L. Rev. 590, 595 (1985).

41. The court in United Fed'n of Postal Clerks v. Blount, 253 F. Supp. 879 (D.D.C. 1971), stated in dictum that the postal workers enjoyed a first amendment associational right to form and join their own labor organization. Other courts have agreed. AFSCME v. Woodward, 406 F.2d 137, 140 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287, 288 (7th Cir. 1968). Courts have not, however, imposed any constitutional duty on public employers to bargain collectively with workers who elect to organize. Indianapolis Educ. Ass'n v. Lewallen, 72 L.R.R.M. (BNA) 2071, 2072 (7th Cir. 1969). Most courts have found that such a duty to bargain is purely a matter of statutory implication.

42. See *United Fed'n of Postal Clerks*, 325 F. Supp. at 885 (Wright, J., concurring).

43. 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424 (1985).

the prior common law decisions pertaining to this subject, the court said that "the right to strike, as an important symbol of a free society, should not be denied unless such a strike would substantially injure paramount interests of the larger community."[44]

In rejecting the traditional arguments against public employee strikes, the court decided that the sovereignty concept was a vestige from another era when the "King could do no wrong." The second justification, that public employers are powerless to respond to strike pressure because the terms of employment are fixed by the legislature, was inapplicable in California where most terms are arrived at through collective bargaining, a right granted to public employees by statute. The court next determined that little empirical evidence supported the argument that governments generally capitulate to unreasonable demands by public employees in order to resolve strikes. Particularly unsupportable was the underlying assumption of the argument that all government services are essential. The court stated that "the absence of an unavoidable nexus between most public services and essentiality necessarily undercuts the notion that public officials will be forced to settle strikes quickly and at any cost."[45] Finally, the notion that the essential nature of government services renders their interruption unacceptable was rejected on the basis that strikes by private employees are tolerated in many of the same areas in which government is engaged, such as health, transportation, and education.

### LEGALITY OF STRIKES BY PUBLIC EMPLOYEES IN LOUISIANA

The *County Sanitation* opinion reflects the growing opinion of legal commentators that distinctions formerly made between the rights of private and public employees to strike are no longer justifiable.[46] A Louisiana court considered the legal status of striking public police officers in 1979 and established the only guidelines applicable to determining whether striking teachers may be dismissed. Louisiana presently has no legislative enactment concerning public employee strikes, and prior to *City of New Orleans v. Police Association*[47] no Louisiana

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44. Id. at 584, 699 P.2d at 848, 214 Cal. Rptr. at 437.

45. Id. at 577-78, 699 P.2d at 844, 214 Cal. Rptr. at 433.

46. See, for example, R. Vaughn, Principles of Civil Service Law § 9.4 (1976); Bernstein, Alternatives to the Strike in Public Labor Relations, 85 Harv. L. Rev. 459 (1971); Burton, Can Public Employees Be Given the Right to Strike?, 21 Lab. L.J. 472 (1970); Haemmel, Government Employees and the Right to Strike—The Final Necessary Step, 39 Tenn. L. Rev. 75 (1971); Kheel, Strikes and Public Employment, 67 Mich. L. Rev. 931 (1969); Comment, The Strike and Its Alternatives: The Public Employment Experience, 63 Ky. L.J. 430 (1975); Comment, Prohibition Revisited: The Strike Ban in Public Employment, 1969 Wis. L. Rev. 930 (1969).

47. 369 So. 2d 188 (La. App. 4th Cir. 1979).

appellate court had decided the question of whether public employee strikes are legal.

*City of New Orleans* initially noted that courts in states which had no statute governing public employee strikes had consistently prohibited such strikes. Rather than apply the traditional rule, however, the court expressly based its holding that police strikes were illegal and could be enjoined on the fact that the withdrawal of law enforcement cannot be tolerated by society. Police strikes are a threat to society's peaceful existence and must be prohibited. In contrast, the court noted that "[s]ociety can tolerate the temporary closing of a museum."[48]

The court's review of the legal literature included several commentators critical of the common law distinction between public and private employees' right to strike.[49] While arguing for the right to strike by public employees in occupations less essential to the continuation of a civilized society, the commentators were in agreement that police and fire employee strikes invariably result in immediate danger to the public and must continue to be prohibited. The court's refusal to rule on the legality of public employee strikes in general was probably strongly influenced by the arguments against the prohibition reflected in the academic arena. The California court in *County Sanitation* drew heavily from these same articles to reach its decision that the right to strike is a basic civil liberty not to be denied in the absence of a threat to the public health and safety.[50]

*City of New Orleans* left unanswered the question of the right of other public employees to strike, thereby creating the inference that strikes by less essential employees may not be prohibited. However, it also failed to provide guidelines for determining the legality of other types of employee strikes. Louisiana courts could find that public policy dictates the prohibition of strikes by the same public employees declared "essential" in other states.[51]

A teachers' strike would not be considered as threatening to the health and welfare of the community as a police or firemen's strike. Since days missed during a school closure are required by law to be made up, teacher unions have argued that the children's education is not endangered.[52] But if a strike lengthened beyond the time available for making up missed days, an injunction could conceivably be granted under *City of New Orleans*. Significantly, that court felt it necessary

48. Id. at 190.

49. See sources cited in supra note 47.

50. 699 P.2d at 841 n.18.

51. See supra note 35 and accompanying text.

52. See D. Colton and E. Graber, supra note 16, at 84: "One of the unique features of teacher strikes [is] that they occur in an organization whose work days can be rescheduled."

to declare strikes by policemen illegal in order to find that the injunction was properly granted. Even if a prolonged teacher work stoppage met the "essentiality" test, it would be difficult to declare all strikes by teachers illegal.

Dicta in a recent Louisiana opinion appears to apply a presumption that teacher strikes are not prohibited. In *St. John the Baptist Parish Association of Educators v. St. John the Baptist Parish School Board*,[53] school employees who had been laid off pursuant to a school board reduction in the work force sought reinstatement and restoration of lost benefits. The employees alleged that their dismissal was actually a direct reprisal against them for participation in a strike earlier that year. The board had agreed as part of a negotiated contract that any later reduction in the work force would reflect the actual seniority of the employees. When a reduction in the size of the force became necessary, the board ranked employees by favoring first those employees who did not strike, followed by employees who returned to work during the strike, and finally those who returned at the end of the strike.

In its factual summary, the *St. John* court stated: "Appellants engaged in a lawful strike and work stoppage against the Board . . . ."[54] No issue was raised regarding any threat to the health and safety of the public caused by the strike. Instead, the court dealt with the case strictly as one in contract law and held that the board had violated the terms of the contract prohibiting reprisals. The board was ordered to reinstate the former strikers and to revise its seniority lists.

The superintendent in *St. John* had attempted to break the strike by notifying the strikers that their positions would be declared vacant and considered abandoned. In light of the court's declaration that the work stoppage was not illegal, the superintendent probably could not have justified dismissal of the striking employees under a charge of willful neglect of duty.[55] Furthermore, a reviewing court would almost certainly hold that the notification letter sent by the superintendent failed to sufficiently comply with the Tenure Act's requirements. A teacher must be found guilty of willful neglect of duty in a full hearing before the board before her dismissal can be effected. No presumption of abandonment can be applied under the Act where the effect of the presumption would be a dismissal for a cause not enumerated.

If the board had interpreted the strikers' failure to return to work on the specified day as a tacit resignation, the Tenure Act would not have been triggered. However, the obvious interest in employment displayed by striking teachers seeking improved work conditions would have precluded the board from finding an intent to resign.

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53. 494 So. 2d 553 (La. App. 5th Cir. 1986).

54. Id. at 555.

55. See supra note 9 and accompanying text.

DISMISSAL OF STRIKING EMPLOYEES FOR WILLFUL NEGLECT OF DUTY

The following discussion attempts to define the parameters of competing interests which necessarily become involved whenever a labor dispute is transferred from the negotiating table to the courtroom.[56] Whereas negotiations concern the underlying issues of work or salary conditions, the judge's concern is to determine and apply the law. Thus, the major consideration in a courtroom where striking teachers are appealing a dismissal based on willful neglect of duty should be the extent of the school board's power to take the action and what, if any, limitations on that power are imposed from other sources. The legality of a strike under state law is a central consideration in upholding a board's dismissal of striking teachers.

In general, where teachers have gone on strike in violation of a specific prohibition, courts have upheld later dismissals as reasonable exercises of the board's duty to preserve the school system. In *Hortonville Joint School District No. 1 v. Hortonville Education Association*,[57] teachers who had been discharged by the school board for engaging in a strike prohibited by state law sued the school board, alleging that their dismissal violated due process. On March 18, 1974, the Hortonville teachers went on strike. On March 20, the superintendent sent all teachers a letter inviting them to return to work. On March 23, he sent the 86 teachers who were still on strike a letter asking them to return and reminding them that strikes by public employees were illegal. Finally, the board decided to conduct disciplinary hearings for each of the striking teachers and sent individual notices of the hearing date.

Counsel for the teachers argued that the board was not sufficiently impartial to exercise discipline over the striking teachers as required by the due process clause, since the board provoked the strike through its failure to meet the teachers' demands. The next day, the board terminated their employment. The teachers then filed suit urging the due process violation. The Wisconsin Supreme Court reversed a trial court grant of a motion for summary judgment in favor of the school board and held that due process required that the teachers' conduct and the board's response be evaluated by an impartial decision-maker.

The sole issue presented before the United States Supreme Court was whether the due process clause of the Fourteenth Amendment prohibited the Hortonville School Board from making the decision to dismiss teachers admittedly on strike and persistently refusing to return to their duties. The Court held that the school board members did not have such a personal or official stake in their decision to dismiss striking

56. See D. Colton and E. Graber, supra note 16, at 95 (discussing judges as decision-makers).

57. 426 U.S. 482, 96 S. Ct. 2308 (1976).

teachers so as to disqualify them, on due process grounds, from making their determination. The Court rejected the argument that the board was biased because it had negotiated with the teachers and instead held that the board had retained the power to decide that the public interest in maintaining uninterrupted classroom work required that teachers striking in violation of state law be discharged. The Court deemed the critical issue to be whether the teachers were, in fact, engaged in an unlawful strike—a fact the teachers admitted. In defining the property right of which the teachers had allegedly been deprived by the board's biased decision-making process, the Court accepted the teachers' contention that they had been deprived of "the expectation that the jobs they had left to go and remain on strike in violation of law would remain open to them."[58]

The Court characterized the governmental interest at stake in the case as one of broad discretionary power. The board's decision "was not an adjudicative decision, for the Board had an obligation to [decide] an important question of policy: What choice among the alternative responses to the teachers' strike will best serve the interests of the school system, the interests of the parents and children who depend on the system, and the interests of the citizens whose taxes support it?"[59] Thus the board's decision was only incidentally a disciplinary one. By permitting the board to make the decision to dismiss striking teachers, the Court chose to leave the balance of power in labor relations where the state law vested it through the statutory grant of power to the board to hire and fire employees.

Had Wisconsin statutorily protected the teachers' right to strike, the board's broad power to deal with teacher strikes would have been modified by the legislature's concurrent expression of state policy that such strikes should be dealt with through the negotiation process. The power of the board to choose from a broad array of alternatives, including dismissal, in ending the strike is circumscribed when a state has deliberately protected public employee strikers. In California, for example, where public employee strikes are neither illegal nor tortious, the exclusive power of the board to hire and fire comes into direct conflict with the perception that the right to strike is a "basic civil liberty." A California school board's exercise of its power to dismiss striking workers possibly subjects the board to a valid due process claim under state law. In contrast, since Louisiana jurisprudence has not clearly expressed a policy of protecting striking public workers, the dismissal power of school boards might not conflict with a basic civil liberty.

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58. Id. at 495, 96 S. Ct. at 2315.
59. Id.

An Illinois case, *Battle v. Illinois Civil Service Commission*,[60] further illustrates the interplay between public policy and the power of the employer to dismiss. In *Battle*, twenty-two municipal workers challenged their dismissal for participating in an illegal strike, failing to report for work for five consecutive days, and withholding of services. The plaintiffs claimed that striking could not constitute cause for discharge of public employees absent a specific Illinois Department of Labor rule to that effect. In holding that the lower court's order of dismissal was properly issued, the court stated that "'[public] employees have no protected right to engage in a strike' and that 'unauthorized absence from employment due to participation in a work stoppage was cause for discharge.'"[61] Notice of the illegality of the strike was not necessary, the court determined, when the jurisprudence consistently had held that no right to strike existed.

The court defined "cause" as "some substantial shortcoming which renders an employee's continuation in office detrimental to the discipline and efficiency of the service and which *law and public policy recognize as good cause for dismissal.*"[62] The public policy prohibiting public employee strikes thus served as a modification upon the power granted by law to the state agency to dismiss for "cause." Had the state of Illinois been among the minority of states which have recognized a limited right to strike, it is logical that this ground for dismissal would be removed from the recognized list of "good causes" regardless of the extent to which the striking employee's continued employment was "detrimental to the discipline and efficiency of the service."[63]

### Effect of the Right to Strike on the "Arbitrary" Standard

The language in *St. John* could be interpreted as a judicial policy determination that teacher strikes do not present dangers to society comparable to police strikes. It must be determined to what extent a court reviewing a dismissal action against striking teachers would favor the rights of individuals over the board's exclusive power to dismiss for willful neglect of duty.

In *Landry v. Ascension Parish School Board*,[64] a tenured teacher who had been dismissed for willful neglect of duty was ordered reinstated with back pay. The teacher had been threatened by a student carrying a two-by-four, and, in fear for his life, the teacher ran to his car in

60. 78 Ill. App. 3d 828, 396 N.E.2d 1321 (1979).

61. Id. at 1325 (quoting Strobeck v. Illinois Civil Service Comm'n, 70 Ill. App. 3d 772, 778, 388 N.E.2d 912, 917 (1979)).

62. Id. (emphasis added).

63. Id.

64. 415 So. 2d 473 (La. App. 1st Cir. 1982).

the parking lot, unlocked it, and retrieved a pistol. He stood with his back to the car and the pistol at his side as a crowd of angry students approached him. The teacher was notified shortly after the incident that a dismissal hearing would be held.

The board conceded that no regulation was violated by the acts of the teacher, but dismissed him because he should have known, by the nature of his position, that his acts could not be condoned. The teacher was also tried and convicted of the crime of aggravated assault by the trial court, but the Louisiana Supreme Court reversed his conviction on appeal.[65]

On appeal of the district court decision ordering the teacher reinstated, the board contended that the mere vindication of the teacher on the criminal charge against him did not place his actions within the range of acceptable conduct for one in his position. Further, the board urged that the teacher's deviation from the board's concept of acceptable behavior amounted to a "willful neglect of duty."

In affirming the order of reinstatement, the court accepted the teacher's argument that because he has a constitutional right to keep and bear arms, subject to some regulations, it was unreasonable and arbitrary for the board to deny him the right to self-defense under the circumstances. The appellate court also apparently accepted the district court's holding that the teacher's discharge constituted policy making which was arguably both ex post facto and punitive in nature. Where the record reflected no violation of a rule, regulation, or policy of the board, the teacher's right to defend himself precluded the board's assertion of a rational basis for his dismissal.

Applying the court's reasoning to a dismissal of a striking teacher, several distinctions may be made. First, a school board probably has a policy regulating the conditions under which an employee may be absent from his duties. Thus, a rational basis for dismissal is more likely to be found in this context. Second, no Louisiana court has held that the right to strike is fundamental. Whether a reviewing court will consider the factors set forth in *City of New Orleans* finding a school board dismissal action to be arbitrary when determining whether a strike may be enjoined is an open question.

The fact that individual competing interests were considered by the court in *Landry* suggests that the legality of a strike may be a factor in a court's determination of a board's rational basis. The right to strike is being developed jurisprudentially in Louisiana, and courts appear to be rejecting the common law prohibition in favor of the more modern

65. State v. Landry, 381 So. 2d 462 (La. 1980). The reversal was based on the court's holding that the use of the firearm by the teacher constituted the affirmative defense of justification.

qualified right to strike. The presence of the fact that a board could not have obtained an injunction against striking workers would probably influence a court reviewing dismissals. If a board has no power to make teachers stop striking, then it should not have the power to take punitive measures.

## CONCLUSION

The recent *St. John* decision, indicating that a work stoppage by teachers was "legal," raises the question of the extent of a school board's power to dismiss striking teachers for willful neglect of duty. Where a board complies with the Tenure Act requirements for notice and a hearing, such a dismissal appears to be within its statutory power as the exclusive determiner of employee hiring and dismissal, absent a grant to teachers of the right to strike.

It is unclear to what extent a reviewing court might consider the protection of the right to strike as a factor when examining a board's rational basis for dismissals. In at least one case, where the teacher acted pursuant to constitutional rights, the court had no difficulty in weighing the teacher's rights against the board's finding of policy violations. A board's dismissal will be considered arbitrary at least to the extent it contravenes the teacher's constitutional rights. In the future, the argument that the right to strike is a basic civil liberty may be accepted as valid by a Louisiana court reviewing board dismissals of striking teachers.

Since few Louisiana cases have been decided on the right of public employees to strike, it is difficult to confidently predict the direction the courts will take regarding subsequent dismissals. The courts could follow one of two approaches. They could apply the *City of New Orleans* rationale, using an injunction ordering employees to stop striking, or a threat of dismissal if the teachers refuse to return to work. Both injunctions and dismissals produce similar results—the return to normalcy at the expense of the strikers' bargaining power. If the courts will protect nonessential employees from the injunctive process, they should likewise recognize that the threat of dismissal serves a similar purpose and effectively gives a school board an unfair advantage. The ability to threaten dismissal discourages school boards from making good faith efforts to improve employee relations with management. Where the days of absence can be rescheduled and no harm is likely to result from the strike, it seems inappropriate for a court to interfere with bona fide labor disputes by upholding such a powerful weapon for management as the mass firing of teachers involved in a concerted work stoppage.

The second possible approach of the courts could be the upholding of a school board's right to manage its affairs in the best interests of the community. Without the discretionary ability to fashion remedies,

a school board could never deal effectively with the infinite variety of labor situations which may arise. Usually, a school board would only choose to resolve a strike by using the dismissal option as a last resort. The public outcry likely to follow from such a perceived injustice would negate the benefits of continuing school with new employees. The second approach would reflect the courts' hesitancy to regulate labor disputes in absence of legislative guidance. Since public employees' right to strike is still ill-defined, the affirmation of teacher dismissals on grounds of willful neglect of duty as a valid exercise of the school board's exclusive power to hire and dismiss is the approach more consistent with the intent of the legislature.

*Janet Resetar*